

P810117-1269

8123159



DEPARTMENT OF STATE
BRIEFING MEMORANDUM

S/S

August 3, 1981

To: E.- Mr. Rashish

From: L - Davis R. Robinson

Subject: Your Meeting with Abram Chayes, 3:00 p.m.,
August 4

DEPARTMENT OF STATE A/CSS/MW
REVIEWED BY: [Signature]
DATE: 8-3-81
RDS: ☐ or XDS ☐ EXT. DATE
REASON(S):
EXT. DATE

SUMMARY: You are meeting Mr. Chayes at his request concerning private litigation in which the Department has taken different positions. As indicated in his letter to you dated July 29 (Tab 1), Chayes, former Legal Adviser and presently a Special Counsel to one of the litigants, will request reconsideration by the Department of its position. L is already reviewing these cases and Chayes may be so informed.

I. Checklist of Objectives:

1. To affirm that the matter is already under review by L.
2. To make no commitment on the outcome of that review, on the way it is handled and staffed within the Department, or on further involvement by the Department in the litigation.

II. Participants:

Yourself

Deputy Legal Adviser Elizabeth G. Verville or
Assistant Legal Adviser John Crook

Abram Chayes, Special Counsel to Sumitomo Corporation
of America

III. Two federal court cases have recently considered whether U.S.-incorporated, Japanese-owned companies may hire executive and other key personnel "of their own choice" under the terms of the 1957 U.S.-Japan Treaty of Friendship, Commerce and Navigation ("FCN

Treaty"), notwithstanding the equal employment opportunity provisions (Title VII) of the Civil Rights Act of 1964. In the case involving Chayes' client, Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552 (2d Cir. 1981), the Second Circuit held that the FCN Treaty does not exempt any Japanese company operating in the U.S. from Title VII. In the other case concerning the Japanese FCN, Spieß v. C. Itoh & Co. America, Inc., 643 F.2d 353 (5th Cir. 1981), the Fifth Circuit held, to the contrary, that the FCN Treaty does exempt U.S.-incorporated, Japanese-owned companies from Title VII insofar as they may discriminate in favor of Japanese nationals in filling certain key executive positions.

Lee R. Marks, former Principal Deputy Legal Adviser to Herbert Hansell, wrote to the Equal Employment Opportunity Commission ("EEOC") on October 17, 1978 (Tab 2), expressing the view that the FCN Treaty does allow Japanese companies to hire Japanese executive personnel, but does not authorize discrimination against a particular sex, religious or minority group; and that in this respect the FCN Treaty applies equally to all Japanese companies operating in the U.S., whether or not incorporated under U.S. law. James R. Atwood, former Principal Deputy Legal Adviser to Roberts B. Owen, subsequently wrote to the EEOC on September 11, 1979 (Tab 3), expressing the contrary view that pursuant to the FCN Treaty, U.S.-incorporated, Japanese-owned companies cannot avail themselves of the right to hire executive personnel "of their own choice." Mr. Atwood's letter did not consider the further substantive question whether such right of Japanese-owned companies not incorporated in the U.S. constitutes an exemption from Title VII in that regard. Neither the Marks letter nor the Atwood letter, appended to amicus briefs of the EEOC, received favorable comment from the courts. In a footnote to its decision, the Fifth Circuit referred to the Atwood letter as "an aberration in State Department policy." Likewise in a footnote, the Second Circuit characterized both letters as "conclusory in tone, providing little guidance as to how the author reached the position adopted."

A petition for rehearing has been filed in the Fifth Circuit Itoh case, and a petition for certiorari has been filed in the Supreme Court for the Second Circuit Sumitomo case. The conflict in the two circuits increases the likelihood that certiorari will be granted. I am therefore reviewing this litigation and preparing a detailed description of the relevant negotiating history of the U.S.-Japan and other FCN treaties, to which the underlying documents themselves would be appended. I anticipate that such review could constitute the basis for an amicus brief filed by the Department of Justice, requesting a rehearing en banc in the Itoh case or for possible use in the Supreme Court.

Particularly in view of the history of the Department's involvement and the widespread interest by the international community and private bar in this litigation, no commitment should be made regarding this review.

TALKING POINTS

- Thank you for bringing this matter to my attention. I have read your letter and listened to your views with interest.
- You are correct that the Office of the Legal Adviser is reviewing the litigation concerning your client in the Second Circuit and other similar cases as well.
- I believe it is inappropriate to make any assurances at this time regarding the outcome of that review, the way in which it is staffed, and possible ways in which it might be used in pending or future litigation.
- However, I can assure you that we are fully aware of the significance of the issues involved here, and that any further involvement by the Department in this litigation would be undertaken only after serious and thorough consideration.

Attachments:

- Tab 1 - Chayes/Rashish Letter
- Tab 2 - Marks/ Sibal Letter
- Tab 3 - Atwood/Prager Letter

Drafted by: L/EB:JHBello:er
8/3/81:x23970

BURTON Z. ALTER
 CAROL SEABROOK BOULANGER
 JONATHAN M. CHURCHILL
 PETER A. DANKIN
 DOUGLAS J. DANZIG
 SAMUEL M. FEDER
 PETER FIGOR
 JOHN J. FINLEY
 ARTHUR J. GAJARSA
 PETER J. GARTLAND
 LANCE GOTTHOFFER
 CARL J. GREEN
 J. PORTIS HICKS
 RICHARD LINN
 MATTHEW J. MARKS
 EDWARD H. MARTIN
 GENE Y. MATSUO
 FUMIAKI MIZUKI
 JIRO MURASE
 ALDEN MYERS
 PETER J. NORTON
 WAYNE E. PARTRIDGE
 ROBERT D. PILIERO
 ROGER L. SELFE
 JOHN B. WADE III
 IRA TENSARD WENDER
 JOHN TOWER WHITE
 *(NOT ADMITTED IN NEW YORK)

WENDER, MURASE & WHITE

ATTORNEYS-AT-LAW
 600 PARK AVENUE
 NEW YORK, NEW YORK 10022

(212) 632-3333
 CABLE WENULAW
 DOMESTIC TELEX 125478
 INTERNATIONAL TELEX 230478 or 236882
 TELECOPIER (212) 752-5378

PARTNERS RESIDENT IN
 LOS ANGELES
 WASHINGTON, D. C.
 CARACAS
 DUSSELDORF
 LONDON
 MEXICO CITY
 MONTREAL
 PARIS
 STOCKHOLM
 TOKYO
 TORONTO

July 29, 1981

Mr. Myer Rashish
 Undersecretary for Economic Affairs
 United States Department of State
 Room 7250
 Washington, D.C. 20520

Dear Mr. Rashish:

Several pending lawsuits raise the question of a private sector foreign investor's right, under provisions commonly found in Friendship, Commerce and Navigation (FCN) treaties, to employ home country nationals in executive and management level positions in wholly-owned subsidiaries in this country. It appears that as many as 40 FCN treaties to which the United States is a party might be affected by the outcome of these lawsuits. The treaties involved govern economic relations with almost all of our major market economy trading partners and some other countries as well. Since the rights granted under FCN treaties are reciprocal, the decisions in these pending lawsuits will also tend to establish the scope of the rights of U.S. private sector investors to control and manage their economic activities abroad.

We represent Sumitomo Corporation of America, a wholly-owned U.S. subsidiary of a Japanese trading company and a defendant in one of the pending cases. The plaintiffs in our litigation challenge the practice of filling management level positions in Sumitomo with non-immigrant "treaty traders". Plaintiffs claim that the U.S.-Japan FCN treaty provision granting U.S. and Japanese investors the right to engage key personnel "of their choice" is modified or superseded by Title VII of the Civil Rights Act, which prohibits certain types of discrimination in employment. Similar claims are presented in

Mr. Myer Rashish
July 29, 1981
Page 2

two other cases of which we know, one also involving the FCN treaty between the United States and Japan, and the other involving the FCN treaty between the United States and Denmark.

Two United States Circuit Courts of Appeals have considered these claims in the last six months and have reached diametrically opposite results. In the case involving our client, the United States Court of Appeals for the Second Circuit held that the right to employ management level personnel granted by the U.S.-Japan FCN treaty is limited by Title VII. In a similar case pending in Texas, the United States Court of Appeals for the Fifth Circuit held that the treaty-based employment right is not so limited. A petition for review of the Sumitomo decision is now pending in the Supreme Court, and, because of the disagreement between the two lower courts, we think it has a good chance of being granted.

In our view, these cases raise important issues of international economic policy, and the Supreme Court should not act on the petition for review nor decide these cases on the merits without the benefit of a fully considered statement of the policy position of the Department of State.

To date, the EEOC has been the sole U.S. government spokesman in these cases. It has appeared in the courts as amicus to present its view that the FCN treaty right must yield to Title VII. Within the State Department, the matter has been treated as a technical legal question, to be handled by members of the Office of the Legal Adviser in consultation with EEOC lawyers. There has been no significant guidance from the policy officers of the Department and even, as far as appears, no personal participation of the Legal Adviser himself. On this basis, in the former administration, different Deputy Legal Advisers at different times took opposite positions on the issue in letters to the EEOC for use in the litigation. The last of these letters signed by a Deputy Legal Adviser accepted the EEOC's view that the employment right granted by FCN treaties may not be asserted by wholly-owned subsidiaries faced with charges of Title VII employment discrimination.

We have in the past presented our views on the law to the Office of the Legal Adviser. We understand that the

Mr. Myer Rashish
July 29, 1981
Page 3

Office of the Legal Adviser is at present engaged in a further review of the question, and we are enclosing with this letter a memorandum of law for renewed consideration. However, it appears to us that the differences between the two Courts of Appeals, to say nothing of the varying positions asserted by the Office of the Legal Adviser over the past three years, suggest that the technical legal materials may not yield a clear resolution of the issue posed without the illumination of relevant policy considerations.

We believe that the advent of a new administration and the appointment of a new Legal Adviser, together with the pendency of the petition for Supreme Court review and the prospect of new treaty negotiations in the present administration, present an appropriate occasion for a thorough reconsideration of the issue, setting the legal materials in the broader context of U.S. foreign economic policy. This is of special importance at a time when the administration is making strenuous efforts to expand U.S. foreign trade, and is counting on U.S. private investors and traders to carry a substantial part of the burden.

Considered in such a context, the most recent position of the Deputy Legal Adviser leads to results wholly inconsistent with the purposes and policies of our government and with the national interest. In particular:

- (1) Challenging the right of foreign firms to manage and control their U.S. subsidiaries with key personnel of their choice will discourage foreign direct investment in the United States. Such investment, which has increased substantially in recent years, totalled over \$60 billion at the end of 1980. It represents a direct positive contribution to the U.S. balance of payments, and is an increasingly important source of the capital needed to modernize and expand this country's plant capacity and to increase productivity.

- (2) Moreover, favorable conditions for foreign direct investment in this country create many additional job opportunities for Americans. For example, according to a study conducted by the Conservation of

Mr. Myer Rashish
July 29, 1981
Page 4

Human Resources Project, Columbia University ("The Economic Impact of the Japanese Business Community in the United States - 1979", The Japan Society, Public Affairs Series 10, New York, 1979), Japanese-owned enterprises in the United States, which employ approximately 10,500 Japanese nationals, provide jobs directly for approximately 81,300 Americans, and the expenditures of those enterprises result as well in an estimated additional 261,600 jobs, all of course subject to the requirements of Title VII. It makes little sense from a policy perspective to jeopardize the multiplier effect of Japanese employment in this country by restricting the ability of Japanese investors to assign managers to their U.S. enterprises.

(3) FCN treaties are cast in terms of reciprocity. To subordinate the treaty-based employment rights of foreign owned companies to domestic legislation is automatically to affirm the right of foreign countries to limit the ability of American companies to engage management level personnel of their choice. In some countries, local laws could be used to exclude persons of particular religions, races or national origins from managerial positions in American-owned enterprises in those countries.

(4) Similarly, the most recent letter of the Deputy Legal Adviser undercuts the position of U.S. owned or controlled foreign enterprises in the face of local efforts, particularly in the LDC's, to force foreign investors to turn over management positions to local nationals, e.g., by imposition of employment quotas or other requirements that key positions must be held by local nationals. With American direct investment abroad now totalling approximately \$200 billion, the United States has an enormous stake in upholding the rights of American private sector investors against such measures, which can easily amount to creeping expropriation.

(5) Finally, if the selection of management level employees is to be governed by local legis-

Mr. Myer Rashish
July 29, 1981
Page 5

lation, the practical effect will be to subject the investor's management decisions regarding the assignment to another country of key personnel to second guessing by host country officials. The resulting uncertainty would have a serious negative effect on direct foreign investment.

The above considerations are not exclusive. They are, in our belief, merely indicative of the important international economic policy implications that are inherent in any position the United States decides to take on the matter of protection of the right of management and control of private foreign direct investments.

We would like very much to have the opportunity to meet with you and other appropriate officials of the Department, including the Legal Adviser, to discuss our views on this matter. We will telephone you in the near future in hopes of being able to arrange such a meeting.

Very truly yours,

WENDER, MURASE & WHITE

by J. Portis Hicks
J. Portis Hicks

and

Abram Chayes
Abram Chayes
Special Counsel

cc: Davis Robinson, Esq.
Legal Adviser
United States Department of State



DEPARTMENT OF STATE

Washington, D.C. 20520

October 17, 1978

*Rec'd 10/26/78
in App. Div.
JTS*

Abner W. Sibal
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

-- Dear Mr. Sibal: --

This responds to your June 9, 1978 letter to Mr. Hansell about the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan (the FCN Treaty). Your letter asks for our views on four questions; the questions and our views are set forth below.

1. Does the treaty permit subsidiaries of Japanese companies which are organized under the laws of a state of the United States to fill all its top management positions with Japanese nationals admitted as treaty traders? Would it be inconsistent with the terms of the treaty to rule that even top management positions are subject to Title VII of the Civil Rights Act of 1964 prohibiting discrimination on the basis of race, sex or national origin?

Article VIII(1) of the FCN Treaty gives nationals and companies of each Party the right to employ, in the territory of the other, "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." This provision was intended to ensure that U.S. companies operating in Japan could hire U.S. personnel for critical positions, and vice versa. The phrase "of their choice" should be interpreted to give effect to this intention, and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders. We express no opinion on what positions

would, in a particular case, qualify as "executive personnel."

We do not believe the phrase "of their-choice" should be read as insulating the employment practices of foreign companies from all local laws. For example, the Treaty does not in our view confer any right to hire in violation of child labor laws, nor does it require the Department to issue a treaty trader visa to persons otherwise ineligible to enter the United States under the Immigration and Nationality Act. Similarly, we do not believe that it confers any right to discriminate against a particular sex, religious, or minority group.* The right granted by the Japanese FCN Treaty to Japanese enterprises operating in the United States is simply the right to fill certain positions with Japanese nationals; American companies operating in Japan enjoy the equivalent right.

2. Is the situation different if the company doing business in the United States is not incorporated in the United States?

Article VIII is addressed to "nationals and companies of either Party...within the territories of the other Party." Article XXIII defines "companies" as "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." In

* Both the Japanese and United States Governments have subscribed to a number of international declarations calling on multinational enterprises to respect human rights and avoid discrimination. See point 7 of the 1976 OECD Guidelines for Multi-national Enterprises and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. These are not binding, but they reinforce our view that Article VIII should not be read as conferring a license to discriminate.

determining the scope of Article VIII, we see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form.

3. What criteria are used by the Department of State in determining what positions are within the scope of the treaty when it issues non-immigrant visas to treaty traders?

The criteria derive from section 101(a)(15)(E)(i) of the Immigration and Nationality Act of 1952, as amended, and 22 C.F.R. § 41.40 et. seq. In addition to the statute and regulations (which do not define "executive personnel"), consular officers have access to the Advisory Opinions of the State Department's Visa Office (special guidance to U.S. consular officers upon request); the Administrative Decisions Under the Immigration and Nationality Laws of the United States by the Board of Immigration Appeals of the INS; and judicial decisions rendered upon appeals from the rulings of the INS.

The Department of State, through its consular officers in American embassies and under limited circumstances its Visa Office in the United States, and the Immigration and Naturalization Service in the case of change of visa requests, determines on an individual basis whether an applicant is entitled to a non-immigrant visa as a treaty trader. In making this determination, both the qualifications of the applicant and proposed position of employment are examined.

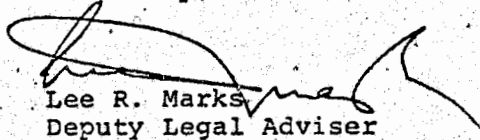
In granting a non-immigrant treaty trader visa, the Department (or INS) thus makes an administrative determination that a visa applicant will fill an "executive personnel" position, but this determination is made for the limited purpose of administering the visa laws. We do not believe that the determination should preclude judicial review of the scope of the term "executive personnel" for other purposes, including the application of Title VII.

4. Is any supervision exercised to determine if persons admitted as treaty traders do in fact operate in the type of position for which they were admitted? What sanctions are imposed if violations are found?

Under the terms of their visas, treaty traders must file annual reports with the INS to show that they are maintaining their treaty trader status. If, on the basis of information furnished in an annual report, the INS determines after investigation that an alien no longer qualifies as a treaty trader, the INS is authorized to order the alien to leave the country, and, if necessary, to deport the alien (8 U.S.C. Section 1257(9); 8 C.F.R. Sections 241.2 and 241.9). During the course of a nonimmigrant's stay in the United States, the INS also has authority to monitor the alien's employment to insure that it complies with the terms of the alien's visas. Private parties may trigger such an INS investigation by lodging a complaint with the district INS office.

If you have any further questions or if we can provide further help, please let us know.

Sincerely,


Lee R. Marks
Deputy Legal Adviser

DEPARTMENT OF STATE

Washington, D.C. 20520

September 11, 1979

Lutz Alexander Prager, Esq.
Assistant General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Prager:

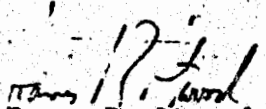
In response to your letters of March 14 and June 21, the Department has conducted an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty, an issue in Spiess v. C. Itoh & Co. (Civ. No. 75-H-267, S.D. Tex.) and two other cases more recently decided in the district court in New York (Avigliano v. Sumitomo Shoji America, Inc., 77 Civ. 5641 (S.D.N.Y.) and Linskey v. Heidelberg Eastern, Inc., 77 Civ. 833 (E.D.N.Y.)).

The manner of coverage of subsidiaries is in many instances complex, making it necessary to rely on the intent of the negotiators to fully comprehend certain provisions. On further reflection on the scope of application of the first sentence of Paragraph 1 of Article VIII of the U.S.-Japan FCN, we have established to our satisfaction that it was not the intent of the negotiators to cover locally-incorporated subsidiaries, and that therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty. In terms of selection of personnel, management or otherwise, the rights of such subsidiaries are determined by the general provisions of Article VII (1) and (4), which respectively provide for national and most-favored-nation treatment of the activities of such subsidiaries. While we do not necessarily agree

with all points expressed by the Court in deciding the Itoh case on the question of subsidiary coverage, we do concur in general terms with the Court's reasoning, and specifically in the result reached in interpreting the scope of the first sentence of Article VIII, paragraph 1.

Thank you for the opportunity to comment on this issue.

Sincerely yours,


James R. Atwood
Deputy Legal Adviser